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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 8, Original.

THE STATE OF SOUTH DAKOTA, Complainant,

vs.

THE STATE OF NORTH CAROLINA ET AL.

ADDITIONAL BRIEF FOR THE STATE OF NORTH CAROLINA.

James H. Merrimon, Counsel.

Robert D. Gilmer,
Attorney General of North Carolina.
James E. Shepherd,
George Rountree,
Of Counsel.

John C. Dowling, Printer, Washington, D. C.

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THE BONDS.

In the first paragraph of its complaint the plaintiff alleges its ownership of ten bonds of the defendant State, and attaches to its complaint, as a part of it, a copy of one of the bonds; and further alleges that "*said bonds the said defendant duly executed and sealed with its seal;*" and further, that "each and every one of said bonds is dated July 1st, 1867, is of the par or principal of one thousand dollars and has matured and become due on the 1st day of July, 1897, and has to it attached semi-annual coupons which fell due from January

1, 1869, to July 1, 1897, inclusive, each of said coupons calling for the sum of thirty dollars, being at the rate of six per centum per annum on said principal" (Record, p. 2).

In answer to this paragraph of the complaint the defendant State says that she denies the alleged ownership, but says further: "That if the complainant is in the possession of said writings obligatory, by assignment or otherwise, such transfer of possession and indicia of ownership are purely colorable and collusive, and made for the purpose of evading the provisions of the 11th amendment of the Constitution of the United States;" and then "denies any and all parts of" this paragraph not admitted, and thus puts in issue the alleged execution of the bonds.

The bonds were not "duly executed and sealed with" the seal of the State, and are not the bonds of the State.

When the charter of the North Carolina Railroad Company was granted (27th of January, 1849, Record, p. 149), the State's indebtedness was not evidenced by bonds with coupons attached, and it was provided in the 38th section of that charter (Record, foot of p. 145), that the public treasurer should "issue the necessary certificates, signed by himself and countersigned by the comptroller," but no seal to the certificate was required. At the next session of the General Assembly, which convened on the third Monday of December, 1852, an act was passed entitled "*An act to regulate the form of bonds issued by the State,*" the first section of which provided as follows:

"That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any act now in force, authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the governor and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to —— —— or bearer, and the principal shall be made payable by the State, at a day named in the certificate or bond. And coupons of interest, in such form as may be prescribed by the public treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto, shall be made payable at such bank or place in the city of New York, as he, the public treasurer, may think proper, or at the office of the public treasury at Raleigh, if preferred by the purchaser: *Provided, however*, That no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value."

Public Laws 1852, chap. 10, sec. 1.

At the following session of the General Assembly (1854–'55) an act was passed entitled "*An act concerning public debt*" (Public Laws 1854–'55, chap. 35), by the third section of which it was provided:

"All bonds or certificates of debt of the State, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, by virtue of any act now or to be hereafter passed, shall be signed by the governor, and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to such person by name as may be the purchaser, or to bearer; and the principal shall be made payable by the State at a day named in the bond or certificate."

The remainder of this section is the same substantially as the first section of the act of 1852. It is further provided by the act of 1855 (section 7) as follows:

"In every bond or certificate of debt issued by the State, *and in the body thereof*, shall be set forth the title of the act, with the year of its enactment, under the authority of which the same may be issued, or reference thereto shall be made by the number of the chapter, and the year of the legislative session."

At this same session of the legislature the "*Revised Code*" was enacted, and included the act concerning the public debt, as chapter 90, and by chapter 121 of the Revised Code, section 1, it was provided that the chapter entitled "Public debt," and some other chapters, should "take effect from and after thirty days after the rise of this session of the General Assembly." This law concerning the public debt will be found in "*Battle's Revisal*," chapter 94, and in the present *Code of North Carolina*, volume 2, chapter 49.

By section 36 of chapter 52, *Revised Statutes* (1835), "all acts of the General Assembly of this State shall be in force only from and after thirty days after the rise of the General Assembly in which such act shall have passed, and not before," unless "expressly otherwise directed," and such is the law today.

The charter of the Western North Carolina Railway Company was granted at the session of the General Assembly of 1854–'55 (Record, p. 116), and many of its provisions will be found to be mere copies from the charter of the North Carolina Railroad Company. By section 35 (Record, foot of p. 124) it is provided:

"That as soon as it may become necessary to borrow the money for the payment of the subscription by this act authorized, the public treasurer shall issue coupon bonds, signed by himself and countersigned by the comptroller."

But no provision is made for a seal.

As no day was fixed in this charter for it to take effect, it followed the general rule above stated.

ARGUMENT.

The copy of the bond made part of the complaint (Exhibit A) shows upon its face that the original was not executed in accordance with the requirements of the law concerning the "*public debt*" of the State. The bond was not signed by the governor, nor countersigned by the public treasurer, nor was it sealed with the great seal of the State, nor was the act under which it purported to have been issued recited in the body of the bond, "or reference thereto * * * made by the number of the chapter, and the year of the legislative session." The provision of the charter of the Western North Carolina Railroad Company above quoted was substantially a copy of the 38th section of the North Carolina Railroad Company, and constituted no part of a contract between the State and the railroad company, and was not intended to supersede the public law.

The question of the power of the legislature to pass a law impairing the obligation of a contract does not arise. As said in Stone *v.* Mississippi, 101 U. S., top of p. 817:

"If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first in-

quiry in this class of cases is, whether a contract has been entered into, and if so, what its obligations are."

It will scarcely be insisted that one of the obligations of the State under the charter of the Western North Carolina Railroad Company was to permit its bonds to be executed and issued without being sealed with the great seal of the State. There is no way of reconciling the provision in the 35th section of the charter of the Western North Carolina Railroad Company, in relation to the execution of the bonds of the State, with the general law on the subject.

In State *v.* Bell, 25 N. C. (3 Ire. L.), pp. 506, 508, it is said:

"All acts passed at the same session of the legislature are to be considered as but one statute."

This is repeated in State *v.* Melton, 44 N. C. (Busby), 49, 51, and the court further said:

"Every statute must receive a reasonable construction, and its letter is often departed from to carry out the manifest intention of the law-makers; and to arrive at a proper construction, when the words are doubtful, it is the duty of the courts of justice to examine and compare the different parts of the same statute, and with the others made *in pari materia*. At the session of the legislature in 1836 all the acts previously in force were re-enacted, and they consequently constitute but one act. * * *" (Foot of p. 51, 44 N. C.): "It is a rule in the construction of statutes that all statutes which relate to the same subject-matter, although some of them may be expressed, or not referred to, must be taken to be one system, and so construed: 1st Bur., 447; 3 Mass. R., 212; Lord Bacon's 3d Rule, vol. 6, 382." (See also Jordan *v.* Wilson, 124 N. C., p. 683.)

Now, at the session of the legislature of 1854–'55 all the acts previously in force were re-enacted and became one statute, called the "Revised Code," and whatever is contained in that statute, or collection, that is *in pari materia* with any of the provisions of charters granted at the same session will be taken as one system and so construed, and all charters granted before that time containing like provisions may be considered.

It is noticeable that by section 38 of the charter of the North Carolina Railroad Company the public treasurer and comptroller were authorized to execute, not bonds, but certificates requiring no seal, while in section 35 of the charter of the Western North Carolina Railroad Company the same officers were apparently authorized to execute bonds, but there was no provision for any seal. It is fair to presume that the legislature had in mind the provision in the charter of the North Carolina Railroad Company, for that section concludes as follows:

"But no greater number of such certificates shall be issued at any one time, than may be sufficient to meet the installments required to be paid by the State at that time."

There could not be a bond without a seal.

In Shepherd's Touchstone, 367, it is said:

"An obligation is a deed in writing whereby one man doth bind himself to pay a sum of money or do some other thing."

In Patterson *v.* Galliher, 122 N. C., 511, it was held, by the supreme court of North Carolina, that, where a statute directed a sheriff to execute a deed to land sold for taxes,

and prescribed a form of such deed which had no seal, the execution by the sheriff of a paper in the exact form prescribed, without a seal, was not a deed. The court said:

"It is not to be doubted that the General Assembly could, if it chose to do so, prescribe a form of deed dispensing with a seal, but, has it done so? is the question. Under the common law, and always in North Carolina, except for the two years between the 7th of March, 1879, and 5th March, 1881, a seal has been held to be absolutely indispensable to the validity of deeds in which is conveyed a greater estate in lands than a three year lease. The conveyance prescribed by statute for sheriff's deeds for taxes is called a deed in the statute as well as in the body of the instrument; and as we have said the attestation clause reads as if a seal was to be affixed. There are no express words used in the statute which alter the general law requiring the affixing of seals to deeds for land, and we cannot arrive at the conclusion that a change so important can be made by implication. The conveyance being called a deed in the statute, and no reference being made in the statute to the dispensing with the necessity of a seal, the word 'deed' must be construed to mean a deed under our general law, and our general law requires a seal to all deeds to land except as to the modification pointed out. In Kitchen *v.* Tyson, 7 N. C. (3 Mur.), 314, the court said: 'Now it is a rule that where a statute makes use of a word, the meaning of which was well ascertained [illegible] common law, the word shall be understood in the same [illegible] it was at common law.'"

In respect of the matter of a seal, there is no distinction between a deed and a bond in North Carolina (Delius *v.* Cawthorn, 13 N. C. (2 Dev. L.), 90; McKee *v.* Hicks, *ib.*, 379). In Vanhook *v.* Barnett, 15 N. C. (4 Dev. L.), at page 270, it is said:

"A bond not executed pursuant to the provisions of the act of 1825, though not good as an official, operates as a *common-law bond.*"

In Graham *v.* Holt, 25 N. C. (3 Ir. L.), top of page 302, it is said:

"A bond is the acknowledgment of a debt *under seal*, the debt being therein particularly specified. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound (Shep. Touch., 56; Com. Dig., *Obligation A*)."

And in this same case it is said:

"The notion with us has always been, what we learned from Co. Lit., 52 (a), and the Touchstone, 57, that he who executes a deed as agent for another, be it for money or other property, must be armed with an authority under seal (McKee *v.* Hicks, 2 Dev., 379; Davenport *v.* Speight, 2 Dev. & Bat., 381). The insertion of the sum in the blank space was intended to consummate the deed; it was done without *legal authority*, and the instrument is void as a bond."

So, what we have quoted from Patterson *v.* Galliher, *supra*, in relation to the necessity for a seal to make a deed applies with equal force to the execution of a bond, and it is manifest, it should seem beyond controversy, that nothing could be the bond of the State, after the passage of the acts of 1852, 1854-'55, and the incorporation of these acts into the Revised Code, unless the bond was signed by the governor and countersigned by the public treasurer and sealed with the great seal of the State. There has been no legislation changing the law in this respect.

I am not inadvertent to what was said in State *v.* Stoll, 17 Wall., 425, viz:

"The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case."

Citing Dillon on Municipal Corporations, section 54, where it is said:

"If both the general and special acts can stand, they will be construed accordingly. If one *must* give way it will depend upon the supposed intention of the law-maker, to be collected from the entire course of legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the State, and of the object of the legislature in the erection of municipalities, as before explained."

All doubt as to the intention of the legislature in respect of the manner of executing bonds of the State is removed by the plain words of the act of 1885:

"All bonds * * * of the State, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, *by virtue of any act now or to be hereafter passed*, shall be signed by the governor, and countersigned by the public treasurer, and sealed with the great seal of the State."

Cardinal rule gives effect to every word and every part of a statute (Washington Market Co. *v.* Hoffman, 101 U. S., 112; Platt *v.* R. R. Co., 99 U. S., 48).

The legislature meant by the phrase "any act now or to be hereafter passed," any act passed or to be hereafter passed at that session of the legislature. Of course that legislature did not mean or undertake to bind future legislatures. This being so it follows that the language of the general law amounts to an express repeal of the provision of section 35 of the charter of the Western North Carolina Railroad Company empowering the public treasurer to execute bonds of the State without a seal. It is certain that the treasurer's seal is not the great seal of the State, and that nothing less than a positive statute could make the seal of the treasurer answer for a seal to bonds of the State. It is no answer to this to say that the practice was, or had been, for the public treasurer to sign and affix his official seal to the bonds of the State. No practice inconsistent with the perfectly clear meaning of a statute can have any effect (United States *v.* Alger, 152 U. S., middle of p. 397, and cases there cited; Studebaker *v.* Perry, 184 U. S., 268–269; Webster *v.* Luther, 163 U. S., foot of p. 341; Wisconsin Central Road *v.* United States, 164 U. S., 205). Even if the language of said section 35 raised a doubt (if that section could be regarded as granting a privilege to that company), it would be construed as being *in pari materia*, with the other statutes cited, and most strongly in favor of the State.

Hannibal & St. J. R. Co. *v.* Missouri River Packet Company, 125 U. S., 260, 271, and cases there cited.

In Winslow *v.* Morton, 118 N. C., 486, 492, it is said:

"Where a later or revising statute clearly covers the whole subject matter of antecedent acts and it plainly appears to have been the purpose of the legislature to give ex-

pression in it to the whole law on the subject, the latter is held to be repealed by necessary implication (Matter of N. Y. Institution, 121 N. Y., 234; U. S. *v.* Tynen, 11 Wall., 88; Jernigan *v.* Holden, 34 Fla., 530; U. S. *v.* Ranlett & Stone, 172 U. S., foot of page 140)."

Besides, if the plaintiff intended to assert that the execution of the alleged bonds was authorized by some special provision of a statute other than the general law, it was its duty to make this known by proper averments in the complaint (Corporation Commission *v.* Railroad, 127 N. C., 283, 285), but instead of doing this it alleges that the bonds were "duly executed and sealed with its seal," whereas it is perfectly plain that they were not duly executed and were not sealed with its seal. This court said in Hanley *v.* Donoghue, 116 U. S., top of page 6:

"When exercising an original jurisdiction under the Constitution and laws of the United States, this court as well as every other court of the National Government, doubtless takes notice, without proof, of the laws of the United States."

And, of course, this court will take judicial notice of the manner prescribed for the execution of bonds of the State of North Carolina, as the manner of their execution is prescribed by public law.

In Fourth National Bank *v.* Francklyn, 120 U. S., at page 751, the court said:

"In the court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the circuit court of the United States, as well as this court, on appeal or error from that court, takes judicial notice of the laws of every

State of the Union (Hanley *v.* Donoghue, 116 U. S., 1, 6, and cases there collected). No reference was made to the statute of 1877, c. 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that the court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. But it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know, and are judicially bound to know, is not the statute that governed the case."

In Mills *v.* Green, 159 U. S., foot of page 657, it is said:

"The lower courts of the United States, and this court on appeal from their decision, take judicial notice of the constitution and public laws of each State of the Union. * * * Taking judicial notice of the constitution and laws of the State, this court must take judicial notice of the days of public elections of members of the legislature, or of a convention * * *, as well as of the times of the commencement of the sitting of those bodies and of the dates when their acts take effect."

And the court "in the ascertainment of any facts of which the judges are bound to take judicial notice, as in the decision of matters of law which it is their office to know, * * * may refresh their memory and inform their conscience from such sources as they deem most trustworthy."

Jones *v.* United States, 137 U. S., 202.

But the court will take judicial notice of a charter granted by the legislature of a State only when the legislature declares it to be a public act.

Case *v.* Kelly, 133 U. S., 21.

The distinction between public and private legislative acts is kept up in North Carolina, and it has been expressly held that the statute incorporating the North Carolina Railroad Company is a private act of which the courts will not take judicial notice.

Durham *v.* Railroad, 108 N. C., 399.

There has never been any act of the legislature of North Carolina declaring the charter of any railroad company to be a public act, so far as I know, and the courts of the State do not take judicial notice of such charters. Hence, if it had been the purpose of the plaintiff to rely upon section 35 of the charter of the Western North Carolina Railroad Company, as furnishing authority to the treasurer of the State to execute the bonds, it should have set it forth in its complaint as has been shown.

Now, to conclude upon this branch of the first issue: Suppose we take all the acts and provisions of acts relating to the public debt as *in pari materia*, to-wit: the acts of 1852 and 1855, and chapter 90, Revised Code, and section 38 of the North Carolina Railroad Company, and section 35 of the charter of the Western North Carolina Railroad Company, and give to each all the effect possible; still, nothing would or could be a bond of the State without being "sealed with the great seal of the State." As we have shown, the one indispensable requisite of a bond or deed is a seal, and of a bond or a deed of the State, the great seal of the State, unless by statute some other seal is provided.

Then, as by all the acts and provisions of acts referred to, the public debt of the State could only be evidenced by bonds of the State, executed in accordance with those acts

and provisions of acts, it follows that the alleged "writings obligatory," the plaintiff claims to own, are not evidence of an indebtedness to the State. They are not bonds of the State, and they are not contracts of the State which any agents of the State were authorized to execute.

In the discussion of this first issue I have deemed it well to treat it, to some extent, as if the facts made a case for the application of the rule that "several acts *in pari materia*, and relating to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system (1 Kent's Com., 12th ed., 463).

But I have also endeavored to show that this rule cannot be invoked under the facts of this case.

Unless the court should hold that, in order to the due execution of the bonds of the State, the governor and public treasurer should both sign them, and the public treasurer and comptroller should both countersign them, and that they should be sealed with the great seal of the State; or, that so far as the bonds to be issued in aid of the Western North Carolina Railroad Company were concerned, they were to be signed by the public treasurer and countersigned by the comptroller pursuant to the provisions of said section 35 of the charter, and be sealed with the great seal of the State, under the provisions of the general law, then it would seem quite impossible to apply the rule above stated. While ordinarily a special law is not repealed by a subsequent general statute unless the intent so is obvious, yet there is no rule to prevent the latter from applying to cases not provided for by the former.

Johanson *v.* Washington, 190 U. S., top of p. 185.

I think that I have clearly shown that section 35 of the *charter* of the Western North Carolina Railroad Company was abolished, in so far as the *execution* of the bonds of the State was concerned, both by the act of 1855, concerning *public debt*, and by chapter 90 of the Revised Code (Rodgers *v.* U. S., 185 U. S., foot of p. 87). I by no means concede that any of the formalities prescribed by chapter 90 of the Revised Code could be dispensed with in the execution of the bonds of the State "after thirty days after the rise" of the session of the General Assembly of 1854–'55, and I propose to give further reasons for not making such concession under my next proposition, to wit:

The signature of the governor and the countersignature of the public treasurer and the great seal of the State were absolutely indispensable to a valid execution of the bonds.

In the case of McGarrahan *v.* Mining Co., 96 U. S., 316, 320, this court had under consideration the execution of a patent of the United States for land under an act of Congress, and near the foot of page 320 said:

"Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office, and countersigned by the recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question

is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may prescribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of land. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands cannot be conveyed except in the form provided by law."

In this case the patent was not produced upon the trial, but the plaintiff put in evidence a certified copy which failed to show that the patent had been countersigned by the recorder, and in stating the case Mr. Chief Justice Waite, in stating the facts, said that "the only question decided by this court is, whether the exemplification admitted on the trial of the cause shows upon its face the execution of a patent sufficient in law to pass the title of the United States."

It was contended that the recorder had recognized the completeness of the patent, and that this was equivalent to his counter-signature, but the court said:

"The case is, therefore, one in which the record shows upon its face an instrument prepared for a patent but not countersigned by the recorder. If a patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant actually perfected. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the Government. To be valid, a patent must be actually executed. Before it can operate as a grant,

the last formalities of the law prescribed for its execution must be complied with. No provision is made for an equivalent of these formalities. Even an actual delivery of a patent by the recorder in person would not supply the place of his counter-signature, any more than the delivery of a paper by a private person without being signed would make it his deed."

This case was cited as authority in Bissell *v.* Spring Valley Township, 110 U. S., 162, where a statute which required township bonds to be executed in a particular manner was in question. There the signature of the clerk was essential to the valid execution of the bonds, and the clerk had not signed them. The bonds were held to be invalid. The case of Anthony *v.* County of Jasper, 101 U. S., 693-697, was also cited.

A statute of Texas provided that bonds to be issued by a city should be signed by the mayor. The bonds were not signed by the mayor, but, under a resolution of the city council, were signed by a private citizen who had been mayor, but had gone out of office and been succeeded by a new mayor. The bonds were held invalid, and the court said, "but we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13th, 1883, until July 3rd, 1884; that W. N. Hodge was not mayor on that day, and that the person who then signed the bonds as mayor was a private citizen."

Coler *v.* Cleburne, 131 U. S., top of page 173: The court cited in this case Anthony *v.* County of Jasper, 101 U. S., 693, where Chief Justice Waite said:

"The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted. * * * The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risk of lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other."

There Has Been no Ratification of the Bonds.

It is contended on behalf of the plaintiff and its associates that the defendant State has recognized and ratified the bonds. This is denied by the defendant, and there is no evidence to establish the affirmative of this issue.

By chapter 98, Laws of 1879, section 4, it was enacted:

"Class 2. For the bonds issued since the close of the war, by authority of acts passed before the war to aid in the construction of the Western North Carolina railroad, * * * twenty-five per cent. of the principal of the bonds or certificates so surrendered."

This brings us to the consideration of the second paragraph of the complaint and the defendant's answer thereto.

The complaint alleges that the bonds were issued under and by virtue of an act of the General Assembly of North Carolina entitled "An act to incorporate the Western North

Carolina Railroad Company," ratified the 15th day of February, 1855, being chapter 228 of the Acts of 1854–'55, and of an act amendatory thereof, to wit, chapter 106 of the Laws of 1866–'67, ratified the 19th day of December, 1866, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes" (Record, p. 2).

The defendant in its answer admits that the writings were issued by the treasurer and purported to be issued under the acts named, but denies that they were issued and sold according to the provisions of said act, and sets forth the provisions of the act, and then denies all that has not been admitted. The evidence in the case shows that the so-called bonds were not issued in accordance with the act mentioned, even if they had been properly executed, and they therefore do not fall within the terms of the act of 1879.

But it is insisted that other bonds of the same class have been exchanged and new bonds issued by the agents of the State. If this were true it would not support the contention of the plaintiff. Unauthorized acts of the State's agents can have no effect to change the law prescribing how the bonds shall be issued, nor to alter the fact that they were not issued as the law prescribed. To sustain this view the authorities already cited are abundant.

Besides, the plaintiff in its bill of complaint does not rely upon any recognition or ratification of the bonds, but solely upon their due execution and issue, and we have shown, as we think, conclusively, that they were neither duly executed nor duly issued. The law was violated both in its letter and its spirit. The act of December 19, 1866, had for its chief purpose the enhancement of the value of the bonds of the

State. By the express provisions of the charter of the Western North Carolina Railroad Company, and of the general law as well, the public treasurer was bound to sell the bonds himself and to get the money into his own hands to pay for the State's stock, and he was not to sell any bond at less than par. By no stretch of construction could the public treasurer claim authority under the law to turn over the bonds to the president or other officer of the railroad company in payment of the stock. The very purpose of the law was to prevent such handling of the bonds of the State, and the result of the public treasurer's conduct in this instance abundantly proved the wisdom of the law.

Discredited bonds—Trask *v.* Railroad Co., 124 U. S., 516.

The president of the Western North Carolina Railroad Company was a State officer, but not one designated or authorized to handle the bonds of the State. The treasurer of the State, Mr. Battle, testified that he knew that the act required that the bonds should be sold for money and at not less than par (Record, foot of p. 91), and that in disposing of the bonds to the president or treasurer of the railroad company he did not sell them for cash, but simply turned them over to the company in lieu of paying money, and that he did this because he knew at the time that the bonds could not be sold at par. The whole transaction was a violation of the law, and the bonds were certainly invalid as between the State and the railroad company, and those who purchased them at from 25 to 40 cents on the dollar knew they were discredited bonds. The attempt of the counsel for the bondholders to make this witness say that there was no dif-

ference between turning over the bonds to the president of the railroad company and paying over money resulted in a miserable failure. The witness testified that the difference was very apparent; that the company would get the bonds and sell them for less than par and would not get the benefit of the difference between the amount they got and par. Besides it will be noted that the State owned two-thirds of the capital stock of the railroad company.

THE MORTGAGE.

Plaintiff alleges, in the third paragraph of its complaint, that at the time of the passage of the act of 1866 (ch. 106, Laws 1866–'67) the State of North Carolina owned thirty thousand shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000, subject to a lien or first mortgage; and that said act of 1866 directed the State treasurer to mortgage, for the security of the bonds held by the plaintiff and others, stock of the State in the North Carolina Railroad Company (Record, pages 2–3).

The defendant answers admitting its ownership of stock and that the treasurer was directed to execute mortgages of this stock when certain bonds were regularly and lawfully issued under the act mentioned; but averred that the act required that the mortgages should be executed and perfected in a particular form and manner, but were not so executed and were not mortgages.

The chief purpose of the act of 1866 was that the State might obtain par, at least, for its bonds to be issued after its passage in aid of the Western North Carolina Railroad Company. The preamble of the act says:

"Whereas, it is manifestly the interest of the people of the whole State that the residue of the bonds, when issued, shall command a high price in the market; therefore,

"SECTION 1. *Be it enacted* * * * That the public treasurer be and he is hereby authorized and *directed*, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina railroad, as collateral security for the payment of said bonds, and to execute and deliver with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of the bond," &c. (Record, p. 11).

At the same session at which this act was passed another act was passed to supplement it, which provided that the Western North Carolina Railroad Company might "put under contract, at any time they may deem advisable, any portion of said road to the western terminus," &c.; and, further, that "whenever one-third the estimated cost of said portions or sections (such portions or sections to embrace at least fifty thousand dollars' worth of work at the estimated cost), have been subscribed by solvent individuals, counties, corporations, or contractors, the treasurer of the State is hereby authorized and empowered to issue bonds of the State for the remaining two-thirds, as provided by an act passed at the present session of the General Assembly (entitled 'An act to enhance the value of the bonds to be issued for the Western North Carolina railroad, and for other purposes') upon the certificate of the president of the said road

to the board of internal improvements, that the stock has been subscribed as above required," &c.

Record, p. 170.

The North Carolina railroad was incorporated in 1849 with a capital stock of $3,000,000 (Record, p. 136). By section 4 of its charter "all subscriptions of stock shall be in *shares* of one hundred dollars," (Record, p. 138), and it is provided by section 22 "that said company shall issue certificates of stock to its members;" by section 36 the "board of internal improvements" was authorized to subscribe on behalf of the State, for stock in said company, to the amount of two millions of dollars to the capital stock of said company, and by sections 37 and 38 provision was made for the payment of the subscription (Record, p. 145).

The General Assembly in 1855 (Laws 1854–'55, Record, p. 149) passed an act instructing the treasurer to subscribe for ten thousand "*additional shares* of the capital stock in the North Carolina Railroad Company," and to pay for these shares by issuing and making sale "of the bonds of the State under the same provisions, regulations and restrictions prescribed for the sale of the bonds * * * issued and sold to pay State's *original* subscription of stock of said company," and this new subscription was to be preferred stock. The "original" and "additional" and preferred stock was subscribed for by the State and paid for.

The State then became the owner of two classes of stock, "common, original," and "additional preferred."

Even without a statute stock in a railroad company is ordinarily classed as "common and preferred."

Elliott, in his work on railroads, vol. 1, sec. 77, says:

"Corporate stock—using that term in the sense in which it is generally used in this connection—may be divided into two principal classes, common and preferred."

The mortgage in question, in the case at bar, a copy of which appears as part of Exhibit A to plaintiff's complaint, purports to be a mortgage of "ten shares of the stock * * * *originally* subscribed for by the State," and this copy, it is admitted, contains the identical words of all the mortgages. It thus appears that none of the ten thousand shares that the treasurer subscribed for on behalf of the State, under the act of 1854–'55, is affected by the so-called second mortgage,

It is claimed by the plaintiff that the mortgage is a statutory mortgage. This cannot be true in the sense that the act of December 19, 1866, of itself constituted a mortgage. There is not one word in the act to justify such contention. It can only be true to the extent that by virtue of the statute authority is conferred upon certain agents of the State to execute "a deed of mortgage."

"A statutory lien can exist only when the statute in terms not doubtful expresses the intention to give a lien."

Jones on R. R., sec. 79.

Cincinnati City *v.* Morgan, 3 Wall., 275.

In Tompkins *v.* Fort Smith Railway, 125 U. S., at page 127, the court discussing the question of a statutory mortgage or lien said:

"There was a plain simple way in which such a lien could be created, and that was by providing in express terms for it."

Before considering the mortgage or mortgages to foreclose which this suit was commenced I think it important to call attention to the pledge of the State made by the act of February 14, 1855 (Record, p. 149), authorizing the public treasurer to subscribe, on behalf of the State, for 10,000 additional shares of stock in the North Carolina Railroad Company. By section 1 of that act these additional shares were to be paid for "by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions, prescribed for the sale of the bonds heretofore issued and sold to pay the State's *original* subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized, that were given for those issued under the direction of said act: *Provided, nevertheless,* That the whole amount of principal money of such bonds or certificates of debt, shall not exceed the sum of one million of dollars."

By this is meant that the provisions, &c., for issuing and selling the bonds under this, should be the same as under the former act, as much so as if said provisions, &c., were actually contained in it, without any reference to the former act whatever; and the pledge of the 10,000 additional shares was to be a security for the bonds issued to pay for them, provided the whole amount of these bonds did not exceed the sum of one million of dollars. The words "and the same pledges and securities are hereby given" did not mean that the same stock pledged to secure the bonds issued under the act of 1849 should be pledged to secure the bonds issued under the act of 1855, nor did they mean that the additional 10,000 shares should be subjected to a lien for the

bonds issued under the act of 1849. So, of the State's 30,000 shares, the "additional" 10,000 subscribed for under the act of 1855 is clearly exempt from any lien in favor of the plaintiff or other holders of the so-called second-mortgage bonds.

There are then but two classes of debts of the State: 1. The certificates issued prior to 1855 to pay for the State's common stock. 2. The bonds issued under the act of 1855 to pay for the State's preferred stock. The first class was a first lien upon the common stock; the second class was a first lien upon the preferred stock.

These two classes of debts have been renewed in pursuance of chapter 138, Laws 1879 (Record, p. 129). By section 8 of that act the new bonds "shall in all respects, stand in the place of and be entitled to the same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said old bonds and coupons *now* have."

In the renewal the old certificates were taken up with new bonds, and the bonds issued under the act of 1855 were taken up with new bonds. To carry out the act of 1879, just cited, these two classes of debts ought to have been kept separate, but judging from a copy of the bond produced by defendant Rothschild, who has been brought into this suit ostensibly to represent the holders of the first-mortgage bonds, they were not. The copy of the bond will be found in the Record, page 77. The recital in it is as follows:

"This bond is in renewal of one of a series issued under acts ratified Jan. 27th, 1849, December 22nd and 25th, 1852, and February 14th, 1855, for the construction of the North Carolina railroad, * * * and is entitled to the

same lien on the State's stock in the North Carolina Railroad Company to which the old bond for which this was given in renewal was entitled."

If I am correct in the construction I have given the act of 1855, as regards the lien or pledge given by that statute, there is no evidence that Rothschild's bonds belong to the class entitled to a first lien upon the State's common stock. The debts constituting such first lien were evidenced by certificates, while the debts created under the act of 1855 were evidenced by coupon bonds. Rothschild, it would seem from his evidence (Record, near foot of page 58), held an old bond and received a new one in the place of it, under the act of 1879. This is some evidence that the bonds he surrendered, when he received the new ones, were of the class constituting a first lien on the 10,000 shares of the State's preferred stock, and, as I have shown, the so-called second-mortgage bondholders have no lien upon the preferred stock.

In all cases where one of a class is permitted to maintain a bill in equity on behalf of himself and all others of the class, care should be taken that such person fairly represents the interests or rights involved, so that they may be fully and honestly tried.

United States *v.* Old Settlers, 148 U. S., 480.

Rothschild, while ostensibly a defendant, is substantially a plaintiff, and permits the bill to be taken against him *pro confesso.*

THE DEED OF MORTGAGE.

If there were no bonds duly executed and duly issued there could be no deed of mortgage; for there was no authorization or direction to execute one except as a part of a valid bond.

The act of December 19, 1866, authorized and directed the public treasurer, whenever it became his duty under the provisions of acts passed at the sessions of 1854–'55 and 1860–'61, to issue bonds * * * to the amount of $50,000 or more, to mortgage an equal amount of stock * * * as collateral security for the payment of said bonds, and to execute and deliver, with each several bonds, a deed of mortgage for an equal amount of stock, to be a part of the bond.

The intention of the legislature probably was, that whenever it became the duty of the treasurer to issue bonds, under the acts mentioned, he should execute a deed of mortgage for an amount of stock equal to the amount of bonds to be issued at any one time, and that an original of this deed of mortgage should be delivered with each bond of that issue.

The issue of bonds could not be less than fifty of one thousand dollars each, but might be more. There would have been no difficulty in preparing a deed of mortgage upon each bond, or upon a paper separate from the bond, covering an amount of stock equal to the amount of all the bonds to be issued at any one time, and expressing upon the face of the mortgage that it was issued under the act of 1866 to secure the whole amount of the bonds of the par-

ticular issue, and that a like mortgage accompanied each of the other bonds, and that all of the said mortgages constituted but one mortgage. The object of requiring that this mortgage should accompany each bond, as a part of it, was, as said in the preamble of the act of 1866, to enhance the value of the bonds. It would have been better if the statute had provided for the registration of a single mortgage and a recital on each bond that such mortgage had been executed and registered.

But the public treasurer thought that the statute authorized and directed him to make a separate deed of mortgage for each bond for a number of shares of stock equal to the amount of said bond, and gave the result of his construction of the statute in the paper claimed by the plaintiff to be a deed of mortgage, to wit:

"Ten shares of the stock in the North Carolina Railroad Company originally subscribed for by the State are hereby mortgaged as collateral security for the payment of this bond."

If this constituted a valid deed of mortgage, under the statute, its effect was to convey to the bearer of the bond the legal title to and to make him the legal owner of ten shares of stock, and to give him the right to call upon the North Carolina Railroad Company for a certificate of that number of shares, or for a separate certificate for each of the ten shares, and to entitle him to all the rights and privileges of a stockholder in the company. There was nothing in the statute or in the mortgage to show that the mortgagee was not to have the possession of the stock, with all the rights of a legal owner in the company. The mortgagee under his

mortgage could have applied to the railroad company for the certificates of stock, and, if he had been refused, could have applied to a court in an action against the company to compel the issuing of the certificates. In a case where a purchaser of stock in the Western North Carolina Railroad Company, at a sale under an attachment, was refused certificates by the company and sued to compel the company to issue the certificates the supreme court of North Carolina held he was entitled to relief.

Morehead *v.* Railroad, 96 N. C., 362.

The language of the statute and the mortgage that the stock shall be a collateral security implies that the holder of the bond was to have possession of the stock.

Burgess *v.* Selligman, 107 U. S., 20.

Jones in his work on Chattel Mortgages, section 1, says:

"A mortgage of personal property is like a mortgage of real estate under the old common law, but differs widely from a mortgage of real estate, as the latter is viewed under the latest doctrine which has been adopted in nearly half of the States and Territories of the United States; for while in these States such a mortgage is regarded as conferring no legal title upon the mortgagee, but as being a mere lien or security, in these same States almost without exception, and everywhere else, a mortgage of personal property is regarded as not being a mere security, but as passing the legal title which becomes absolute in the mortgagee upon default."

If this be the correct exposition of the law it should seem that the plaintiff, if his mortgages are of any value whatever, has become the absolute owner of one hundred shares

of the stock originally subscribed for by the State, and is entitled to all the rights of a stockholder in the company to the extent of the amount of its stock, and has no need to call upon this court for any relief whatever.

In Casey *v.* Cavaroc, 96 U. S., 477, it is said :

"When, * * * the title has been transferred to the creditor * * * the character of the security is not affected at the common law by the debtor having actual possession of the collateral. In such case, they are held by the creditor by way of mortgage as well as pledge ; and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. * * * The possession need not be actual: it may be constructive ; as where * * * a bill of lading is assigned, in such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge ; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security—that of mortgage and that of pledge ; mortgage by virtue of the title, and pledge by virtue of the possession.

"This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their endorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in White *v.* Platt

and in Clarke *v.* Iselin. Hence, the actual possession of the securities by the creditor was a matter of less importance in those cases."

Unquestionably, if the mortgage, in the case at bar, was of any validity whatever, it conveyed the legal title of the ten shares of stock to the bearer of the bond, and, as the stock (not the mortgage) was to be the collateral security for the payment of the bond, the possession was transferred to the bearer as much as it was possible for the stock in its then condition to be transferred.

In section 4 of the charter it was provided:

"That all subscriptions of stock should be in shares of one hundred dollars, the subscriber paying at the time of making such subscription $5 on each share thus subscribed."

Record, p. 138.

Now, as I have said, the mortgage had the effect, if it had any effect, when executed and delivered, to convey not only the title to, but the possession of, the stock, because the title and possession were inseparable in the stock's then condition. But I insist the mortgage was not authorized by the statute and was invalid. Many definitions have been given of stock and shares of stock.

Capital stock has been defined as "the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors."

1 Elliott on R. R., sec. 76, citing 1 Cook on Stockholders, sec. 9.

The term capital stock is often used to embrace all the property or capital of the corporation.

"Shares of stock (unless declared by statute to be real estate) are personal property, and are subject to purchase and sale by natural persons as other personal property, and the right of the shareholder to sell and transfer his stock cannot be restrained by a by-law of the corporation."

1 Elliott on R. R., sec. 92.

The possession of stock not divided into shares or not evidenced by certificates it should seem would be inseparable from the legal title. It can be counted only so much of the capital stock, and when it means anything else it cannot refer to anything else than the interest of the shareholders or individuals (23 N. Y., 192, 220; Bailey *v.* R. R. Co., 22 Wall., 604, 637).

"The term 'stock' has been used at times to indicate the same thing as capital stock. Generally, however, it means shares of stock."

1 Cook on Cor., sec. 8.

"A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation."

Ib., sec. 12.

"The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts."

Gibbons *v.* Mahon, 136 U. S., 549.

"A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends."

Neiler *v.* Kelley, 69 Pa. St., 403, 407.

From these authorities it is indisputable that a share of stock is a right to a certain thing or things. Now this right is what the statute authorized and directed to be mortgaged if the public treasurer put the proper construction upon it. How is it possible for one to have the legal title to a *right* without having the possession of that *right?* May he not be in possession of a right and yet not in the enjoyment of what the right entitles him to?

Cook on Corporations (vol. 2, sec. 464) says:

"Shares of stock may be the subject of a mortgage or pledge. A mortgage of stock, however, is not often made; and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage. In fact it is difficult to ascertain from the cases how shares of stock may be mortgaged; and a few early decisions, which held certain transactions to be mortgages, would to-day be held to be pledges. There are but few clear cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered, * * * would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books."

This author then cites in a note a case from Kentucky, and says:

"The clearest and most satisfactory case is Spalding *v.* Paine, 81 Ky., 1, 416 (1883), where a chattel mortgage of a share of stock was duly recorded in the proper county, the mortgagor retaining the certificate of stock. The mortgagor subsequently sold and transferred the certificate of stock to a *bona fide* purchaser. The court held that the recording of the mortgage was of no avail, that there could be no mortgage of choses in action, and that the *bona fide* transferee took the stock."

Of course the answer to this will be that the statute authorized the mortgage, but I contend that the statute authorized more than the mortgage—that it authorized a pledge as well, and that this is clearly implied from the words "as collateral security for the payment of this bond." I understand that it was not the mortgage that was to constitute the collateral security, but the thing mortgaged—the ten shares of stock. The clear purpose was to convey to the mortgagee both title and possession, and I am strengthened in this view by the well-settled rule in this State in regard to mortgages of personal property.

In Doak *v.* Bank of the State, 28 N. C. (6 Ir. Law), top of page 319, it is said:

"A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer until the debt is paid. A mortgage is a pledge and more, for it is an

absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation, to be a lien upon it. Generally speaking, a bill in equity to redeem will not lie on behalf of a pledgor or his representatives, as his remedy is at law, upon a tender of the money."

Chief Justice Ruffin, in the case just cited, speaking of "stock and choses in action generally," says:

"They are not goods or chattels, and as such subject to a *fieri* or *levari facias;* and there is no instance, that I am aware of, except one, in England, in which the court of equity has laid hold of them for the satisfaction of judgments—for they are not equitable property, but are legal rights. * * * Being in their nature legal rights, equity leaves it to the law to dispose of them; and no method has as yet been provided for that purpose, but that of taking execution against the body, and thereby inducing the owner to pass them by his contract in satisfaction of the particular debt, or to surrender them as a bankrupt or insolvent for the benefit of all his creditors. The court of equity deems that an adequate remedy, and therefore sees no necessity for coming in aid of the law."

The Chief Justice then shows that the English case to which he referred made an exception on account of the insolvent debtors' act, the benefit of which the defendant in the case had taken, and thereby became protected against *ca. sa.*, but by the act of Parliament his future effects were liable for the debt. He then goes on to say that even that case had been questioned by very high authority—that of the court of exchequer—in Otley *v.* Lines, 7 Price, 274.

From what I have said, I insist that, if the plaintiff has any rights at all under his mortgage, they are as perfect and complete as any decree of this court could possibly make them. But I do not wish to be understood as conceding that the mortgage is of any effect whatever. If it should become the purchaser of stock at a sale under a decree of this court, it could acquire no greater right than it now has, for it now has the right to demand certificates from the company and to be recognized as a stockholder entitled to receive dividends. If these rights should be refused it may sue the company in the circuit court of the United States or in this court to compel it to issue the certificates and to pay over the dividends.

No controversy had arisen between the plaintiff and defendant State at the date of the commencement of this suit.

The mere fact that the plaintiff held the ten bonds sued upon, and that the said bonds were past due and unpaid, did not constitute a controversy *per se*.

In Louisiana *v.* Texas, 176 U. S., 18, it is said:

"In order that a controversy may arise between two States, there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution, and it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made."

And in Missouri *v.* Illinois, 180 U. S., 208, 219, Justice Shiras, delivering the opinion of the court, used the following language:

"As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, *in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.*

"But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration."

He then takes up a large number of cases showing what controversies are justiciable, and when they arise under the Constitution, and quotes the language I have quoted from the case of Louisiana *v.* Texas, *supra.*

And the Chief Justice and the two Associate Justices, who joined with him in the dissenting opinion in the case of Missouri *v.* Illinois, *supra*, say:

"Controversies between the States of the Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the States are in direct *antagonism as States.* Clearly this bill makes out no such state of case."

And I may insist that the bill in the case at bar "makes out no such state of case;" and I also insist that if what has occurred since the filing of the bill would be sufficient to constitute such controversy, yet it did not exist at the time the suit was commenced.

The defendant State at that time did not so much as know that the plaintiff held any bonds purporting to be its bonds. The governor of North Carolina was examined as a witness and testified that the first intimation he had that the plaintiff had bonds was what he saw in a newspaper account of an application of the plaintiff to this court for leave to file the bill.

If it be answered that a controversy had arisen and was in existence at the time the plaintiff acquired the bonds, the reply is that such controversy was not one upon which a suit might have been maintained in a court of justice, was not assignable, and could not be availed of by the plaintiff.

II.

But if a controversy did exist at the date of the commencement of the suit, the pleadings and evidence disclosed a condition of things which ought to prevent this court from entertaining jurisdiction of it in this suit.

1. The suit is brought not for the plaintiff State alone, but for a class, and the bill contains all the averments that would have been necessary if all the holders of the class of bonds on which this suit is based had been made plaintiffs.

The defendant Salter is made a defendant to avoid this situation, but he is in all respects substantially a plaintiff, and his answer for himself and the class in which he belongs contains substantially a repetition of the averments of the bill. He is but a defendant in form.

"The original jurisdiction of the Supreme Court of the United States depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only."

Louisiana *v.* Texas, 176 U. S., 1, 16, near top of page.

2. The donation of the ten bonds sued upon was not to the State as a State, but to the State as a trustee for some charitable institution of the State to be selected by the State legislature. The precatory words with which the donation was accompanied was sufficient to raise an implied trust, and the declaration of the trust was sufficiently definite.

Miller *v.* Atkinson, 63 N. C., p. 537.

1 Perry on Trusts, sec. 112 *et seq.*

This, it would seem, would bring the case within another rule laid down in Louisiana *v.* Texas, *supra*, that the suit must be one between States as States, and not between a State acting as trustee, as plaintiff, and another State.

In the case at bar the plaintiff does not "present herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens."

3. The ten bonds sued upon were not donated to the plaintiff State, but constituted the consideration for a contract between it and the holders of the so-called second-mortgage bonds, whereby the plaintiff State engaged to institute a suit in the Supreme Court of the United States for the benefit of all the holders of said classes of bonds; and this brings the case within the rule of New Hampshire *v.* Louisiana, 108 U. S., 76, 85, 91:

"Where a citizen could not maintain an action if the matter or controversy were between him and the State he will

not be permitted to use the name of the State and seek relief in the Supreme Court."

In The United States *v.* Beaufort, 3 Pet., 12, 30, it is said:

"It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

This language was used by the court with reference to the right to enforce the cause of action sued upon in a court of justice.

See also United States *v.* Nashville, etc., R. R. Co., 118 U. S., 125.

4. The transaction between the plaintiff State and Schaffer, who represented the so-called second-mortgage bondholders, was against public policy, as being an attempt to control "the regular administration of justice."

This court in Tool Company *v.* Norris, 2 Wall., —, speaking of agreements against public policy, said:

"It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary consideration to control the business operations of the Government, or the regular administration of justice * * * are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the doors to temptation, by refusing them recognition in any of the courts of the country."

This language was repeated by the court in McMullen *v.* Hoffman, 174 U. S., 648, in which case the doctrine of con-

tracts against public policy is very fully discussed, and it is there said:

"The law looks to the general tendency of such contracts. The vice is in the nature of the contract, and it is condemned as belonging to a class which the law will not tolerate."

It may be conceded that "if the State had the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," and "if the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached" (Doyle *v.* Insurance Co., 94 U. S., 541). But the defendant in the case at bar says that the court will look at the facts and legitimate inferences from them to ascertain what the constitutive or ultimate facts are, and in this case the defendant insists that the pleadings and evidence clearly establish that the plaintiff State and the so-called second-mortgage bondholders entered into a conspiracy to acquire a jurisdiction in this court of a suit, not for the State of South Dakota, but for the said second-mortgage bondholders as a class.

The conduct of the plaintiff State and its associates, who are in substance plaintiffs, but in form defendants, has been such as to justify this court in refusing to entertain jurisdiction or to grant any relief, upon the principles announced by this court in the case of The Pope Mfg. Co. *v.* Ghormally, 144 U. S., 224, 233–237.

This bill may be considered one for specific performance to the extent that this court is asked to make the mortgage one "*in solido*," etc.

This court can look into all that was said and done by the plaintiff and its associates in their negotiations to secure a standing in this court. If the letter written by Schaffer to Mr. Burke is to be regarded as containing the terms of the so-called gift to the plaintiff, still the court can look into all that was said and done, whether contained in this letter or not.

Ward *v.* United States, 14 Wall., 28.
Merriam *v.* United States, 107 U. S., 437.
United States *v.* Gibbons, 109 U. S., 200.

The so-called mortgage is too indefinite for any purpose. It is like the mortgage of "ten new buggies," executed by a buggy-maker, who had on hand at the time more than ten new buggies, none of which was delivered to the mortgagee. The supreme court of North Carolina held this mortgage to be void for uncertainty, or rather that it did not pass the title to any particular new buggies.

Blakeley *v.* Patrick, 67 N. C., p. 40.

But if the mortgage can be regarded at all, then the bond which is annexed as a part can be used only as a means of ascertaining the *pro rata* share of each holder of the bonds in the proceeds of the sale of the stock.

The transfer of the ten bonds to South Dakota was only a transfer at best of an interest in the mortgage, and the relation of South Dakota to the other holders of the bonds brings the case within the decision of this court in Farmington *v.* Pillsbury, 114 U. S., 138. In that case certain citizens of the State of Maine transferred coupons to a citizen of Massachusetts under an arrangement by which "the

plaintiff gave to the agent of the holders of the coupons his note for $500, and agreed, as a further consideration, that if he succeeded in collecting the full amount of the coupons he would pay the agent fifty per cent. of the net amount collected above $500." It was held that this suit was for the benefit of the owners of the bonds, and was their own in reality, though they had agreed that the plaintiff might retain one-half of what he collected for the use of his name and the trouble in collecting it. The court said:

"It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off two years, when it was, no doubt, supposed the result of the suit would be known. * * * In the language of Mr. Justice Field, speaking for the court in Detroit *v.* Dean, 106 U. S., 537, 541, applied to facts of this case, the transfer of coupons was 'a mere contrivance, a pretense, the result of a collusive arrangement to create' in favor of this plaintiff 'a fictitious ground of Federal jurisdiction,' so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State."

Will it be pretended that the counsel for the "class" represented by Salter is here to defend?

The plaintiff State was placed in possession of ten bonds under a contract for the use of its name as plaintiff in a suit which it was believed would enure to the benefit of all holders of bonds of the same class. The evidence establishes this beyond doubt. If States are to be subjected to the same rule in respect of jurisdiction as individuals, this suit cannot be maintained. The case of Blacklock *v.* Small, 127 U. S., 96,

104, where a defendant in name and form was substantially a plaintiff, and by her answer ranged herself on the side of the plaintiffs as against her codefendant, Small, and joined in the prayer of the bill, and asked that payment of the bond and the satisfaction of the mortgage be declared void, &c., the court held that the suit was thereby shown to be substantially one by and for the benefit of this answering defendant, and as she was a citizen of South Carolina as well as her codefendant, Small, the court had no jurisdiction. In Pacific R. R. *v.* Ketchum, 101 U. S., middle of page 299, it is said:

"Although nominally defendants according to the pleadings, they voluntarily, in the course of the proceedings, arrange themselves on the same side of the subject-matter of the action with the complainants. This they had the legal right to do. After that, clearly the *controversy* was between citizens of one or more States on one side and citizens of other States on the other side, and when the decree was rendered the only thing to be done was to foreclose the mortgage sued on, as between the trustees of the mortgage acting with their beneficiaries and the railroad."

In the case at bar Rothschild and Salter, professing to represent all the holders, of the same class of bonds claimed by the plaintiff, have voluntarily and without objection on the part of the plaintiff, arranged themselves on the same side of the subject-matter of the suit with the plaintiff.

Now if the same rule applies in a case where one State sues another in this court as applied in Blacklock *v.* Small, the plaintiff having voluntarily associated itself with individuals on the same side of the controversy will have to submit to have its bill dismissed.

If the scheme of the bondholders was to have the plaintiff bring suit in this court, and the ten bonds were turned over to the plaintiff for such purpose, it was a fraud upon the law, upon the jurisdiction of this court, and upon the rights of the defendant. And I insist that even if the plaintiff was innocent of any knowledge of such purpose, inasmuch as she was a mere volunteer, paying nothing for the bonds, she will not be permitted to avail herself of the fraud of her donor.

"No one can be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition" (Black *v.* Bayless, 86 N. C., foot of p. 534).

It is not even disguised that the purpose of the bondholders was to bring about the exact state of things we have here now, and the rule we have just stated is applicable.

But the plaintiff knew all about the matter, and it was through her counsel that the scheme was originated, and she is charged with whatever knowledge he is possessed of, and with whatever knowledge any of her attorneys possessed.

"Information to an attorney is information to his client; and the latter is affected with notice of all facts notice of which can be charged upon his attorney" (Smith *v.* Ayer, 101 U. S., 320; May *v.* Le Claire, 11 Wall., 217).

It is insisted by the plaintiff's counsel that the motive of the bondholders does not concern defendant. In this case we utterly deny that any such rule applies. They say that no one has any interest in the ten bonds except the plaintiff.

This we also deny, and insist that the evidence shows that the ten bonds and all others of the same class constitute but one controversy, and that the bondholders, other than the plaintiff, are so much interested in the ten bonds claimed by the plaintiff, that the only hope they have in the world of ever realizing anything upon their own bonds is based upon the result of the plaintiff's effort here to collect the bonds sued upon. The interest of the other bondholders in the ten bonds is vital. It will not do to say that merely because the other bondholders will not be entitled to receive any of the money that may be collected on the ten bonds, they have no interest in them, for that would be to contradict the whole theory of this suit. The true spirit and far-reaching effect of the eleventh amendment is not only to prevent an individual from suing a State, but also to prevent him from entering into any scheme by which he can realize only just what he would realize if he were able to sue himself.

III.

The cause of action alleged in the bill of complaint, if it can be called a controversy between the plaintiff and defendant State, is not susceptible of litigation in any court of justice—in other words, it is not justiciable.

It was held in Chisholm *v.* Georgia, — U. S., —, that a State might be sued in the Supreme Court of the United States in assumpsit by a citizen of another State, but this decision was reversed by the *eleventh amendment* to the Constitution.

It has been uniformly held by this court that "those who deal in the bonds and obligations of a sovereign State are aware that they must rely *altogether* on the sense of justice and good faith of the State" (Bank of Washington *v.* Arkansas, 20 How., 530, 532).

Plaintiff's counsel cite the case of Cohen *v.* Virginia, 6 Wheat., 406–'7, to show that the "motive for the adoption of the 11th amendment was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation." This court has in a much later case said just the contrary.

In *In re* Eyers, 123 U. S., foot of p. 504, Mr. Justice Matthews said:

"It cannot be doubted that the 11th amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for the enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation (Louisiana *v.* New Orleans, 102 U. S., 203). That obligation, by virtue of the provision of article I, § 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have con-

sented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense (Beers *v.* Arkansas, 20 How., 527; Railroad Co. *v.* Tennessee, 101 U. S., 337). The very object and purpose of the 11th amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with the large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, where citizens of other States or aliens, or that the course of their public policy and administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In Railroad Co. *v.* Tennessee, 101 U. S., foot of p. 339, Chief Justice Waite said:

"Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry

is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract."

This whole doctrine is very fully discussed in Hans *v.* Louisiana, 134 U. S., 1, 13, 14, *et seq.*

Justice Bradley, in delivering the opinion of the court in this case, said:

"Looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided."

Smith *v.* Reevis, 178 U. S., 446, approves the case just cited, and reiterates what was there said in regard to the suability of a State.

Now, if this was the law, it became a part of the contract between the defendant State and the holder of any of the bonds of the class sued upon that the obligation of the defendant was only upon its conscience, and that the holder had nothing to rely upon except the obligation of *good faith.*

In Edwards *v.* Kersey, 96 U. S., top of p. 601, it is said:

"It is also the settled doctrine of this court that the laws which subsist at the time and place of making the contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

Now, suppose each of the bonds sued on in this case had "incorporated in its terms" that the State should have the privilege of paying in its own way "free from every constraint but that which flows from the obligations of good faith," could it be contended that any court could take jurisdiction of a suit based upon such bonds?

The obligation of a contract has been defined to be "the law which binds the parties to perform their agreements" (Walker *v.* Whitehead, 16 Wall., 318).

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement" (Nelson *v.* St. Martin's Parish, 101 U. S., foot of p. 720).

"The obligation of a contract is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it" (Louisiana *v.* New Orleans, 102 U. S., foot of p. 206).

What has been said applies with the same force to the mortgage as to the bonds. Indeed, the mortgage by express provision is made a part of the bonds. Besides, it would be an anomaly if the mortgage could be enforced by a court without jurisdiction to decide whether the bond it was given to secure was valid or invalid. This would be in effect the case of South Dakota *v.* Ten Shares of Stock. *Reductio ad absurdum.*

If the plaintiff had no right to come into this court and ask to have a judgment or decree of the court for the bonds, whence comes the jurisdiction to foreclose the mortgage?

True it is that none of the holders of the so-called second-mortgage bonds prior to the donation to the plaintiff State

could have maintained an action or a suit to recover the same or to foreclose the mortgage; but this was not because there was no court for them to go into, but because it was a part of the contract between them and the State of North Carolina that no obligation except that of good faith was imposed upon the State of North Carolina by the contract, and that it had the right and privilege of paying in its own way, "free from every restraint but that which flows from the obligations of good faith."

Contracts between a nation and an individual are only binding on the conscience of the sovereign and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

In Wisconsin *v.* Pelican Ins. Co., 127 U. S., foot of p. 288, it is said:

"This court has declined to take jurisdiction of suits between States to *compel the performance of obligations*, which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their government."

If this be the law it will end this case, for I take it no one will contend that if the plaintiff State and defendant State were independent nations, not in any way connected with the United States—not subject to the suzerainty of any other nation—and one held a debt against the other which the other would not pay, it would constitute a justiciable controversy.

It is not the mere personal disability of an individual holding bonds of a State that prevents his suing to recover them. The infirmity is in the very subject-matter of the

action. The imperfection is in the obligation, and this imperfection follows it into whosesoever hands it may come, be he individual or State.

I know "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

JAMES H. MERRIMON,
Counsel for Defendant, The State of North Carolina.